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Supreme Court of the United States.

OCTOBER TERM, 1918.

No. 250.

THE UNITED STATES, *Appellant*,

v.

NELSON P. VULTE.

Appeal from the Court of Claims.

Brief for Appellee.

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Supreme Court of the United States.

October Term, 1913.

THE UNITED STATES, *Appellant*,
v.
NELSON P. VULTE. } No. 256.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

This case is clearly stated in the opinion of the Court of Claims, by Judge Booth (record, pp. 3 to 5), 47 C. Cls. 324, 325:

"The plaintiff is a first lieutenant in the Marine Corps. On June 27, 1908, in obedience to proper orders, he sailed from New York, for Porto Rico, remaining on duty there until November 3, 1909, when detached and ordered back to the States. This suit is to recover 10 per cent additional pay for service in Porto Rico, dating said service from the time of departure from the United States until return thereto.

"The plaintiff's pay proper was originally fixed by section 1612, R. S., as follows:

"'The officers of the Marine Corps shall be entitled to receive the same pay and allowances, and the enlisted men shall be entitled to receive the same pay and bounty for reenlisting, as are or may be provided by or in pursuance of law for the officers and enlisted men of like grades in the Infantry of the Army.'

"On June 30, 1902 (32 Stat. L. 512), as part of the appropriation act for the Army, the Congress modified

existing law respecting the pay proper of officers of this grade by the following language:

"'For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,-456; *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto.'

"Thus far the rights of plaintiff respecting pay are obvious; the complications arise by subsequent legislation.

"Following this statute on June 12, 1906 (34 Stat. L. 247), Congress provided—

"'For additional ten per centum increase on pay of commissioned officers serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto (excepting Porto Rico and Hawaii), as provided by act approved June 30th, 1902, the time of such service to be counted from the date of departure from said States to the date of return thereto.' * * *

"The Army appropriation act of the next session of Congress repeated the above provisions (34 Stat. L. 1164).

"The act of May 11, 1908 (35 Stat. L. 110), provided as follows:

"'That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto shall be as now provided by law.

* * * * * * *

"'For additional ten per centum increase of pay of officers on foreign service, $285,000.

* * * * * * *

"'That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all

laws or parts of laws inconsistent with the provisions of this act are hereby repealed.' "

The court gave judgment in favor of the claimant for the amount claimed; and the United States appealed (rec. p. 5).

II. BRIEF OF ARGUMENT.

Text of Act of 1908.

We give below all provisions of the act of 1908 which will be referred to in this brief (35 Stat. L. 108, 110, 114, 115):

"That hereafter the annual pay of officers of the Army of the several grades herein mentioned shall be as follows:

* * * * * * *

"That increase of pay for service beyond the limits of the States comprising the Union, and the territories of the United States contiguous thereto, shall be as now provided by law.

* * * * * * *

"That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army; and all laws or parts of laws inconsistent with the provisions of this Act are hereby repealed.

* * * * * * *

"For additional ten per centum increase on pay of officers on foreign service, $285,000.

"For additional twenty per centum increase to enlisted men on foreign service, $767,000; *Provided*, That officers and enlisted men who have served on army transports in the Philippine Archipelago at any time since May 26th, 1900, under the control and orders of the commanding general, Philippines Division, or who may hereafter so serve, shall be entitled to receive the same rate of pay as is provided by law for officers and enlisted men serving at shore stations beyond the limits of the United States.

* * * * * * *

"The specific appropriations hereinbefore made for

officers and enlisted men in the line of the Army and in the several staff corps and departments, enlisted men in the Hospital Corps, officers and enlisted men in the Porto Rico Provisional Regiment of Infantry, and officers in the Philippine Scouts, being based upon former rates of pay, said specific appropriations are hereby increased to the amounts necessary for payment of such increase of pay at the rates established in this Act."

The Question Stated.

The decision of the Comptroller of the Treasury, referred to by the court towards the close of its opinion (rec. p. 5) is so pertinent and applicable to the question in this case that it is annexed to this brief as an Appendix (*post*, pp. 32–35).

This decision held that the appropriation of April 23, 1904 (33 Stat. L. 266), amounted only to "a failure to appropriate sufficient money to pay the increased pay for the fiscal year 1905, so far as the Army is concerned."

As the appropriations for the Marine Corps were made simply in general terms for "pay and allowances prescribed by law," etc., he held that there was not even a failure to appropriate, and that those serving in the Marine Corps were entitled to receive ten per cent increase pay, while serving in Porto Rico and Hawaii, out of the current appropriation made by the act of 1904 for the year ending June 30, 1905.

The decision of the Comptroller is submitted to be correct and to be as applicable to the question now before the court as to the one which was directly before the Comptroller. It was accepted by Congress as the basis for appropriation, as shown in the brief of the Assistant Attorney-General (p. 8).

This claim rests upon the act of 1902 as reenacted and continued by that of 1908 (*ante*, pp. 1–3). These

are Army statutes applying to the Marine Corps by Rev. Stat. Sec. 1612.

Neither act excepts service in Porto Rico from the general grant of the increase. Nor is it excepted in any other legislation of 1908 or 1909.

The case of the United States must rest upon the following propositions:

1. That the clause in parenthesis in the army appropriation acts of 1906 and 1907 (34 Stat. L. 247, 1164, quoted *ante*, p. 2) — "(excepting Porto Rico and Hawaii)"—constituted a suspension or temporary repeal for those particular fiscal years of so much of the act of 1902 as allowed increase of pay for service in those two places.

2. That this suspension or temporary repeal was made permanent by the act of 1908 (*ante*, p. 2) providing that increase of pay for service beyonds the limits of the States and Territories "shall be as now provided by law."

3. That the exceptions thus parenthetically made to the army appropriation acts of 1906 and 1907 are to be brought forward by construction to limit the effect of the appropriations for the Marine Corps in 1908 and 1909.

The appellee, on the other hand, submits the following propositions:

1. That the clause of 1906 and 1907 in parenthesis—"(excepting Porto Rico and Hawaii)"—constituted a limitation or restriction upon the expenditure of the money appropriated by those acts for particular fiscal years and was not a repeal, temporary or permanent.

2. That, whether this be so or not, the act of 1908, declaring that increase of pay for service beyond the limits of the States and Territories "shall be as now pro-

vided by law," meant, as provided by the existing permanent provision of the act of 1902.

3. That, whatever be the purport of the army appropriations, there is no exception to the application of the appropriations for the Marine Corps as regards either Porto Rico or Hawaii.

Let us examine in succession the purport of the legislation, first of 1906 and 1907, and then of 1908.

Acts of 1906 and 1907.

The act of 1906 (*ante*, p. 2) is a mere appropriation. The literal construction of its terms is, that Congress was limiting the expenditure of the particular sum appropriated in the clause. If the terms of the act can be satisfied by this construction this is conclusive in its favor. A literal construction must always be adopted where it involves no absurdity or contradiction (*Dewey* v. *United States*, 178 U. S. 510, 521).

A repeal *pro tanto* of the act of 1902 can not be inferred by indirection merely from language of appropriation. Repeals by implication are never favored; and one statute will not be construed so as to repeal another if by any reasonable construction the two may stand together. In *United States* v. *Langston*, 118 U. S. 389, a permanent provision of law fixed the salary of the Minister to Hayti at $7,500, but by the appropriation acts covering the period in question, only $5,000 was appropriated for each year for the payment of the salary. The court said in the opinion by Mr. Justice Harlan (118 U. S. 393, 394):

"The salary of the Minister to Hayti was originally fixed at the sum of $7,500. Neither of the acts appropriating $5,000 for his benefit, during the fiscal years in question, contains any language to the effect that such sum shall be 'in full compensation' for those years, nor

was there in either of them an appropriation of money 'for additional pay,' from which it might be inferred that Congress intended to repeal the act fixing his annual salary at $7,500. Repeals by implication are not favored. It can not be said that there is a positive repugnancy between the old and the new statutes in question. If by any reasonable construction they can be made to stand together, our duty is to give effect to the provisions of each. *Chew Heong* v. *United States*, 112 U. S. 536, 549; *State* v. *Stoll*, 17 Wall. 425, 430; *Ex parte Yerger*, 8 Wall. 85, 105; *Ex parte Crow Dog*, 109 U. S. 556, 570. The suggestion of most weight in support of the view that Congress intended to reduce the salary of the diplomatic representative at Hayti, is the improbability that that body would neglect, in any year, to appropriate the full sum to which that officer was entitled under the law as it then existed. On the other hand, it is not probable that Congress, knowing, as we must presume it did, that that officer had in virtue of a statute—whose object was to fix his salary—received annually a salary of $7,500 from the date of the creation of his office, and after expressly declaring in the act of 1878, 20 Stat. 91, 98, that he should receive that salary from and after July 1, 1878, and again, in 1879, that he should receive the same amount from and after July 1, 1879, should, at a subsequent date, make a permanent reduction of his salary without indicating its purpose to do so, either by express words of repeal, or by such provisions as would compel the courts to say that harmony between the old and the new statute was impossible. While the case is not free from difficulty, the court is of opinion that, according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law."

The general principles here stated are applicable to the

present case, for the defense here is a demand to construe the latter statute as a repeal by implication of the earlier, although the two statutes may, by a reasonable construction, be made to stand together. The *Langston* case and this case are immediately analogous, for in each a repugnance is asserted between a permanent grant and a narrower appropriation to meet the grant.

This view is enforced by the classic statement of Justice Story in *Minis* v. *United States*, 15 Pet. 423, 445:

"It would be somewhat unusual to find engrafted upon an act making special and temporary appropriations any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation."

An annual appropriation bill must pass; this necessity affords the most favorable opportunity for hasty legislation to be engrafted upon it. The rule laid down in the last quoted sentence, sanctioned by long continued authority, effectively guards against this by refusing to recognize such enactments as intended to be of wider scope than they are clearly expressed to be. Such is the claimant's contention here.

The Court of Claims has had occasion to discuss the existence of a liability independent of an appropriation. In *Collins* v. *United States*, 15 C. Cls. 32, 35, 36, Judge (afterwards Chief Justice) Richardson, explains the nature of an appropriation act as passed in pursuance of the provision of the Constitution that "no money shall be drawn from the Treasury but in consequence of appropriations made by law." (Constitution, Art. I, Sec. 9, Clause 7.) He says:

"The compensation to which public officers are legally

entitled depends upon general and continuing laws fixing their salaries. The officers of the Treasury have no authority to pay such compensation until appropriations therefor are made; and these are made by Congress annually, except in the case of the judges of the Supreme Court, for whose salaries there is a permanent annual appropriation (Rev. Stat. Sec. 3689, 2d ed. p. 729). The liability however, exists independently of the appropriation, and may be enforced by proceedings in this court. In *Graham's case* (1 C. Cls. R. 381), where Congress appropriated a sum less than the amount of the salary established by law for the office which the claimant held, it was determined that he was entitled to the full amount of the established salary, and he recovered judgment therefor."

This principle in regard to the character and function of an appropriation act is illustrated by two decisions of the Court of Claims, neither of which was appealed to this court. In the first of these, *Converse* v. *United States*, 26 C. Cls. 6, 8, 9, the court considered and thus construed the following statute:

"'Nor shall any part of the money appropriated by this act be used in payment of a per diem compensation to any clerk or marshal for attendance in court, except for days when business is actually transacted in court, and when they attend under sections 583, 584, 671, 672, 2013 of the Revised Statutes, which fact shall be certified in the approval of their accounts.' (24 Stat. L. p. 253.)

"It was, of course, within the power of Congress to change the compensation of clerks and marshals, to allow them fees where none had been allowed before, or take away fees which existing statutes gave; but it was equally within their power to place a restriction upon the accounting officers of the Treasury as to a particular appropriation, taking away from them the discretion of paying the per diem in certain cases, and leaving clerks and marshals to their remedy at law, to the end that the right, if it existed, might be judicially determined.

"If any doubt could exist as to the effect which should

be given to this statute, it would be removed by the subsequent action of the legislative power, for Congress, a year later, when legislating concerning the same fees of the same officers, provided in unequivocal language:"

Here follows a repealing statute just as Congress in 1912 repealed the provision for increase in Hawaii and Porto Rico (*post*, p. 14).

Again, and more elaborately, in *Geddes* v. *United States*, 38 C. Cls. 428, the question was as to the effect of the following statutory provision (p. 443):

"That no part of the money herein or hereafter appropriated for the Department of Agriculture shall be paid to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government."

The court thus construed this provision (pp. 444, 445):

"That statutory provision is a proviso to an appropriation, and its plain purpose is that no person in the Department of Agriculture, or out of the Department of Agriculture, who is receiving 'compensation as an officer or employee of the Government shall be paid additional compensation for additional service out of general funds appropriated for the Department of Agriculture.' Applying to no designated class of persons, it is a provision of law controlling appropriations for the Department by limiting the discretionary authority of the Secretary. The evil against which it is directed is the practice of allowing additional compensation for additional service in that Department.

"That limitation upon the power of the Secretary does not constitute a defense. An appropriation is the setting aside by Congress of a designated amount of public money for a designated purpose.

"'No money shall be drawn from the Treasury but in consequence of appropriations made by law.' (Const. Art. I, sec. 9.)

"The accounting officers are the guardians of the

appropriations. It is their business to see that no money is paid out of the Treasury unless the payment is authorized by an appropriation act. It is not their business to adjudicate abstract questions of legal right beyond the legal right of a person to be paid out of a specific appropriation. An appropriation constitutes the means for discharging the legal debts of the Government.

"The judgment of a court has nothing to do with the means—with the remedy for satisfying a judgment. It is the business of courts to render judgments, leaving to Congress and the executive officers the duty of satisfying them. Neither is a public officer's right to his legal salary dependent upon an appropriation to pay it. Whether it is to be paid out one appropriation or out of another; whether Congress appropriate an insufficient amount, or a sufficient amount, or nothing at all, are questions which are vital for the accounting officers, but which do not enter into the consideration of a case in the courts. This has been repeatedly held by the Supreme Court and this court, beginning with *Graham's Case*, in the first volume of the Reports. (1 C. Cls. R. 380.) The appropriations made for all the Executive Departments, except that of the Department of Agriculture, are specific—so much for this object, so much for that. But it has been the legislative practice for some years to appropriate gross amounts for the Department of Agriculture, and at the same time to append the above limitation upon the power of the Secretary. The judgment of this court will not be paid out of that appropriation; the limitation upon the power of the Secretary does not extend to the court; the real question before the court is that of the claimant's legal right to receive the pay of both offices, irrespective of the statutes above quoted. All these questions were considered in *Collins' Case* (15 C. Cls. R. 22), and are there exhaustively treated."

The opinion in each of these cases is by Chief Justice Nott of that court. The rule is thus well established, that a restriction upon the expenditure of a particular appropriation will not be extended into a change of substantive law.

This court, in a case decided at the present term, refused to interpret a proviso to an appropriating clause as of wider import than the subject-matter of the appropriation. (*Pennington* v. *United States*, 231 U. S. 631.)

The present case is an attempt on the part of the United States to give to an appropriating clause relating to one fiscal year, a far-reaching and permanent construction, setting aside an existing clearly expressed statute.

Rules as to Appropriation Bills.

These views receive added force at the present day by consideration of the restrictions thrown by statute, as well as by rules of Congress, around the enactment of appropriation bills. These are designed to confine them to their legitimate function of providing money to carry on the Government in accordance with existing permanent legislation, and to prevent them from being used to enact new and substantive legislation.

The act of June 22, 1906, provides:

"Sec. 4. Hereafter the estimates for expenses of the Government, except those for sundry civil expenses, shall be prepared and submitted each year according to the order and arrangement of the appropriation acts for the year preceding. And any changes in such order and arrangement, and transfers of salaries from one office or bureau to another office or bureau, or the consolidation of offices or bureaus desired by the head of any Executive Department may be submitted by note in the estimates. The committees of Congress in reporting general appropriation bills shall, as far as may be practicable, follow the general order and arrangement of the respective appropriation acts for the year preceding." (34 Stat. L. 448.)

When all the appropriation acts now involved were

passed, the following was a rule of the House of Representatives:

"* * * nor shall any provision changing existing law be in order in any general appropriation bill or in any amendment thereto.—Rule XXI, Clause 2." (Digest and Manual, Rules and Practice, House of Representatives, 54th Cong. p. 279.)

The rule of the Senate has always been and still is to the same effect. Rule XVI, Clause 3, provides as follows:

"No amendment which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject-matter contained in the bill be received;" etc. (Senate Manual, 54th Cong. p. 16.)

Notwithstanding the rule, it was always held that "the House may by limitation on a general appropriation bill provide that no part of an appropriation shall be used for a certain purpose." (Hinds' Precedents of the House of Representatives, Vol. 4, Chapter XCVIII, Limitations in General Appropriation Bills, Paragraph 3917, p. 617.)

The rule of interpretation laid down by Justice Story in *Minis* v. *United States*, 15 Pet. 423, quoted, *ante*, p. 8, that an attempt to engraft general legislation on appropriation bills is not to be presumed except "where the language admits of no other reasonable interpretation" is in strict accordance with the practice of Congress as expressed in legislative rules. So too is the discrimination of the Court of Claims in the cases cited, *ante*, pp. 9–11, between a limitation on an appropriation and a change of law.

An incidental parenthetical clause, such as the words "(excepting Porto Rico and Hawaii)", is therefore not general legislation, changing existing law even for the year to which the appropriation act applies, but is a mere

"limitation of expenditure" under this appropriation. Much less can it be held to make a permanent change of law.

It was in order as such a limitation only, and after so gaining a position upon the bill, is not to be construed as a change of existing law unless it "admits of no other reasonable interpretation."

In the 62d Congress, beginning March 4, 1911, Clause 2 of Rule XXI was amended to read as follows:

"2. No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works and objects as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order, except such as being germane to the subject-matter of the bill shall retrench expenditures by the reduction of the number and salary of the officers of the United States, by the reduction of the compensation of any person paid out of the Treasury of the United States, or by the reduction of amounts of money covered by the bill."

This permits new and general legislation on appropriation bills, if it retrenches expenditures. In accordance with the new rule, Congress enacted in the Army appropriation act, approved August 24, 1912:

"That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii, or Porto Rico." (37 Stat. L. 576.)

This is plainly general legislation. Immediately upon its enactment and not before, the right to receive the ten per cent increase for service in the places named came to an end.

Consideration of the special function of an appropriation

act will emphasize the presumption against repeal by implication in such act.

An annual appropriation act is a necessity to the Government. An attempt is sometimes made by one House of Congress to use this necessity to force the passage of general legislation not wanted by one or more of the three separate branches of the legislative power.

We may suppose a case where one House desires to reduce the scope of an existing law and the other desires to make an appropriation to carry it out fully. One House may properly assert that it can not be coerced into lessening the scope; the other that it can not be compelled to make an unlimited appropriation. The result would be the triumph of both negatives in the passage of a limited appropriation. It would take the form of the appropriation now under consideration in the words "(excepting Porto Rico and Hawaii)."

Thus it is seen that the presumption against the general character of legislation on appropriation bills declared in *Minis* v. *United States*, *ante*, p. 8, rests in its last analysis upon the constitutional relations of the Houses of Congress.

The objections to such legislation were forcibly illustrated in connection with the army appropriation act of 1912, from which a quotation has been already made, *ante*, p. 14. The President vetoed the bill when it first came before him partly on the ground that—

"In addition to the appropriation bill proper there were enacted by the House of Representatives, in six appended sections and elsewhere in the bill, a body of legislation which would substantially reorganize and change the existing military establishment. Among other things, this legislation * * * altered the amounts of pay and conditions of allowances made to officers and enlisted men"; etc. (House Document No. 835, 62d Cong. 2d Sess.)

He thus forcibly stated the true theory of legislation on appropriation bills:

"This brief summary of the history and character of the affirmative legislation attached to this bill serves to bring out the objections thereto. The dangers inherent in the practice of attaching substantive legislation to appropriation bills have been frequently pointed out by my predecessors. The only justification that has been offered for such practice is that it has been found a convenient method for facilitating the passage of measures which are deemed expedient by all the branches of government which participate in legislation. Thus, it has more than once occurred that useful items of Army legislation, generally of an urgent character, have been passed in this manner, when the desirability of the enactment was recognized and acquiesced in by the common consent of both the Executive and of Congress."

In the present instance, the words "(excepting Porto Rico and Hawaii)" literally mean nothing more than an exception from the accompanying appropriation. There is nothing in the language used to show that "the desirability of the enactment" of a change in the substantive law "was recognized and acquiesced in by the common consent of both the Executive and of Congress." But the rule already quoted, *ante*, p. 8, is, that such an intent "must be expressed in the most clear and positive terms."

To hold that the words under discussion are a repeal of the grant of 1902, is to hold that the failure of all three branches of the legislative power to concur in appropriating fully to carry out an existing statute constitutes a repeal *pro tanto* of the statute.

Reference is made in the brief for the United States (pp. 8–10), to conference reports and even to debates. These references are of doubtful admissibility as aids in the construction of the statute (*United States* v. *Freight*

Association, 166 U. S. 290, 318, 319). They fail to touch the question involved in this case. The utmost that any one of them show is either an omission or exception of Porto Rican and Hawaiian service from the appropriations made by the acts covering service in a particular fiscal year.

The provisions here involved got into the bill in the guise of restrictions upon the expenditure of particular appropriations. Having obtained a standing in the bill by virtue of their ostensible character as limitations upon appropriations, they are now claimed to be not mere restrictions upon appropriations or even mere temporary repeals, but to operate as repealing for all time the permanent and general provision of the act of 1902. A provision should not be permitted to masquerade through Congress in one character, only to assume a totally different phase after being enacted into law.

As said by Chief Justice Nott in *Wisconsin Central R. R.* v. *United States*, 27 C. Cls. 440, 467, 468 (affirmed, 164 U. S. 190), "It is most undesirable that a public measure shall mean one thing when it is a bill before Congress, and another when it is a statute before the judiciary. Canons of construction which may lead to this result are to be shunned."

Carden v. *United States*, 45 C. Cls. 171, 176, cited in the brief for the United States (foot p. 12), was the claim of a Revenue Cutter officer for ten per cent increase while traveling in Europe. It has nothing to do with Porto Rican service and is entirely without application to the question involved in the present case.

Act of 1908.

All the services for which the increase is here claimed were rendered after the passage of the act of May 11, 1908, increasing the pay of the Army and consequently

of the Marine Corps, *ante*, pp. 3, 4. The question in this case is therefore not so much the construction of the acts of 1906 and 1907 as that of 1908.

The clause of the act of May 11, 1908, appropriating "for additional ten per centum increase on pay of officers on foreign service," *ante*, p. 3, makes no exception of Porto Rico, Hawaii, or any other particular place. Nor do those of 1909 (35 Stat. L. 739), 1910, and 1911 (36 Stat. L. 250, 1043). The exceptions in the appropriation acts of 1906 and 1907, *ante*, p. 2, were at most temporary and applicable only to those years. It follows that, if this appropriating clause were the only passage on the subject in the act of 1908, there could be no question of the right of any officer of either the Army or Marine Corps, serving in Porto Rico or Hawaii, to receive a ten per cent increase on his pay for the year thereby appropriated for and likewise in later years.

Service in Porto Rico and Hawaii is claimed by the United States to be excepted through the operation of that provision of the act of 1908, which says, *ante*, p. 3:

> "That increase of pay for service beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, shall be as now provided by law."

The obvious and natural meaning of the several clauses of this sentence may be defined as follows: "That increase of pay for service," that is, for all service, "beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto," that is, everywhere beyond such limits, "shall be as," that is, at the rate and computed in the manner, "now provided by law," that is, granted by existing substantive enactment.

There is nothing which suggests any purpose to refer

back to anything but a pre-existing permanent and general enactment.

It is followed shortly afterward by a provision, *ante*, p. 3, "That nothing herein contained shall be construed so as to reduce the pay or allowances now authorized by law for any officer or enlisted man of the Army."

The Government's contention may be reduced to the following: (*a*) If the act of 1908 contained nothing more than the appropriation in the same language as used, "for additional ten per centum increase on pay of officers on foreign service," the increase would be due for Porto Rican and Hawaiian service, because provided by existing law. (*b*) But the act of 1908 also contains a provision, that increase for service beyond the States and contiguous Territories shall be "as now provided by law," and another provision forbidding any reduction of pay, both being clearly intended to protect, and not to destroy, existing rights. (*c*) The Government claims that the latter provisions take away what would have been the claimant's rights under a simple appropriation.

Such a construction defeats itself. No member of either House of Congress who voted for this act of 1908 could possibly have guessed from the language that he was voting for anything but a comprehensive increase of pay for all service beyond the limits of the States and Territories of the Union.

As this court has said in *Dewey* v. *United States*, 178 U. S. 510, 521:

"Here, the language used by Congress is unambiguous. It is so clear that the mind at once recognizes the intent of Congress. Interpreted according to the natural import of the words used, the statute involves no absurdity or contradiction, and there is consequently no room for construction. Our duty is to give effect to the will of Congress, as thus plainly expressed."

It is only by attempting to read between the lines for some hidden purpose of Congress that any exception of particular places from the generality of this legislation can be inferred.

An official publication of the War Department issued in 1911 shows that that Department did not at that date recognize the existence of any exceptions to the general provisions for increase of pay for service beyond the limits of the States and contiguous Territories.

"The Military Laws of the United States, Fourth Edition, 1901," contains, on page 317, under the head of "Increased Pay for Foreign Service," as paragraph 816, the text of the act of March 2, 1901, which is substantially identical with that of 1902. (See the text of both, *post*, pp. 33, 34.) In 1911 there was published a "Supplement to the Fourth Edition of the Military Laws of the United States Showing Changes to August 22, 1911," etc., "Prepared under the Direction of Brigadier General Enoch H. Crowder, Judge Advocate General, United States Army, by Lieutenant Colonel John Biddle Porter, Judge Advocate, United States Army." This supplement contains, at page 1219, the following:

"INCREASE PAY FOR FOREIGN SERVICE.

"816a. Increase of pay for service beyond the limits of the States comprising the Union, and the territories of the United States contiguous thereto, shall be as now provided by law. Act of May 11, 1908 (35 Stats. 110.) (This paragraph merely reaffirms paragraph 816.)"

The note in parenthesis is conclusive that the provision of the act of 1908 merely reaffirms the old statutory provisions of 1901 and 1902, without any exceptions against Hawaii or Porto Rico. No such exceptions are treated

in the paragraph here quoted, or anywhere else in this supplement as existing law in 1911. This is an authoritative official construction of the law, which is entitled to great weight.

Unofficial construction in publications edited with great care and in very general use throughout the country, is to the same effect.

The provisions of the acts of 1902, *ante*, pp. 1, 2, granting the foreign service increase, and 1908, *ante*, p. 3, continuing the increase "as now provided by law," are the only statutes on this subject contained in the Compiled Statutes, Title XIV, The Army, Chapter 3, Pay and Allowances, Supplement, 1911, pp. 339–341. The intervening legislation of 1906 and 1907 is omitted as relating only to temporary appropriation. While this is an unofficial publication, the omission is significant as indicating the natural construction as it appears to an expert and impartial editor of laws.

The same is true of the Federal Statutes Annotated, in which, Vol. 7, p. 1038, the act of March 2, 1901, for increase of pay for foreign service, appears with a notation of its amendment of 1902, and in the Supplement, 1912, the provision of the act of 1908 for increase of pay "as now provided by law" appears at p. 699, without the slightest reference to any intervening legislation.

A circumstance not to be overlooked is one mentioned by the Court of Claims in its opinion,—the "substantial increase in each succeeding appropriation bill to meet the additional pay for services of this character" (record, p. 5).

The appropriation of 1907 for the 20 per cent increase to enlisted men was $575,000 and for the 10 per cent increase to officers $210,000 (34 Stat. L. 1164). In 1908, the appropriation for increase to enlisted men was

$767,000, and to officers $285,000 (35 Stat. L. 114) and these sums were "based upon former rates of pay," and were "hereby increased to the amounts necessary for payment of such increase of pay at the rates established in this Act" (35 Stat. L. 115; *ante*, pp. 3, 4).

Thus Congress carried out the purpose of liberality to the Army by granting all that previous general legislation had allowed and more; without re-enacting any of the temporary restrictions upon expenditure found in some of the former appropriation acts.

A Legislative Construction.

The question what was the increase of pay for service beyond the limits of the States, etc., "now provided by law," has received legislative construction. The act of 1908 (*ante*, p. 3) says that this increase "shall be as now provided by law." As we have seen, the question for solution is whether this expression refers to the general and permanent law contained in the act of 1902 (*ante*, pp. 1, 2) or to the temporary excepting clause contained in the acts of 1906 and 1907 (*ante*, p. 2).

Now, Congress in this very act of 1908 defined the service for which "increase of pay" is "now provided by law."

This proviso (35 Stat. L. 114; *ante*, p. 3) directs "That officers and enlisted men who have served on Army transports in the Philippine Archipelago at any time since May 26th, 1900, under the control and orders of the commanding general, Philippines Division, or who may hereafter so serve, shall be entitled to receive the same rate of pay as is provided by law for officers and enlisted men serving at shore stations beyond the limits of the United States."

Thus we have in the same act of 1908 a definition that the increase of pay "provided by law" is "for officers

and enlisted men serving at shore stations beyond the limits of the United States." This is a contemporaneous legislative construction made by the same act *in pari materia*.

It has been seen, *ante*, p. 14, that on August 24, 1912, Congress enacted: "That hereafter the laws allowing increase of pay to officers and enlisted men for foreign service shall not apply to service in the Canal Zone, Panama, or Hawaii or Porto Rico." Its abolition "hereafter" presupposes its existence "heretofore" in the opinion of Congress. If the act of a later Congress can ever influence the construction of an earlier act, this act must be held to recognize the continued force of the acts of 1902 and 1908.

Opinions of Attorney-General.

The Attorney-General is frequently called upon to construe legislation of this character. The general presumption against repeal is forcibly stated by Attorney-General Cushing in his opinion on *General Scott's* case (7 Opin. 399, 431, 432):

"It is in the power of the lawgiver to repeal at will, by express terms, any existing statute.

"When he abstains from doing this, and contents himself with subjoining new provisions as new exigencies arise—sometimes adding to, sometimes taking away from, what exists—and the administrator of the law is called upon to determine a suggestion of implied repeal, that determination is aided if not guided by rules of established legal or logical presumption.

"In the absence of expressed will of the legislator to repeal a particular provision of existing law, there is presumed a purpose of coherence and compatibility of enactment, so that all the provisions, new and old, may stand together—rather than a purpose of undefined but irreconcilable repugnancy, in contradiction with methodical unity of thought.

"In such absence of any expressed will to repeal, the mind of the juridical expositor follows the general rule of presuming in favor of that which is, and against a dissolution of continuance.

"Finally, as a corollary from the last principle, a provision of law once existing by legislative enactment, the affirmation in argument is with him who pretends repeal; on him is the burden of proof, and he must establish his proposition to the satisfaction of the determining judgment.

"'Whoever,' say the authorities of the civil law, in unison with those of the common law, 'alleges the abrogation of a law once promulgated and received, from him, when that is material, the proof is to be exacted. For, since laws are enacted with intent that they shall endure, and in order that they be observed by the people, it follows that, until the contrary be proved, all presumptions militate for their obligation and duration of use.' (J. Voet, ad Pandect, lib. 1, tit. 3, art. 40.)

"These are the rules on the subject, which, being the well settled result of long experience, have passed into axioms of universal jurisprudence. They govern the reason with decisive authority in the investigation of a subject like this, requiring exact and critical discrimination of the most delicate implications of law."

In 27 Opin. 108, the question was whether certain provisions empowering the Postmaster-General to impose fines upon railroads for delays in their mail service, which, like those here involved, appeared in the appropriation acts for 1906 and 1907, but were omitted from that of 1908, were to be regarded as thereafter in force. The Attorney-General said (pp. 109–111):

"The question thus presented is, what effect, if any, shall be given to the omission of Congress to incorporate in the appropriation bill for the current year a clause similar to those above set forth? Or, to put it otherwise, are the provisions with respect to the fining of railroads for delays in carrying the mails, which were made a part of the appropriation acts for the fiscal years ending June

30, 1907, and June 30, 1908, to be regarded as permanent or as temporary legislation?

"In my judgment, these clauses in the appropriation bills are meant to be and are the law for the appropriation period, and for that only. This conclusion is reached by a study of several considerations.

"*First.* Congress itself has given a legislative construction to the words used. The language employed in the first of these appropriation acts is 'that the Postmaster-General shall require all railroads carrying the mails under contract to comply with the terms of said contract,' while in the second it is declared 'that the Postmaster-General shall require all railroads carrying the mails to maintain their regular train schedules'; the remaining words in both clauses being identical. Now, so far as the prompt arrival and departure of mails is concerned, there is no difference between requiring the railroads to keep their contracts and requiring them to maintain their regular train schedules. What the railroads contract to do is to carry the mails in accordance with the schedules fixed by them. These two provisions being thus designed to accomplish the same purpose, it follows that Congress would not have incorporated such a clause in the second appropriation bill referred to if it had thought that a similar clause in the first appropriation bill was permanent legislation. So, further, the omission of any provision on the subject in the last appropriation act indicates a conscious purpose thereafter to abandon the requirement altogether. In this connection it may be added that, while the intent of a legislative body can not be ascertained by a resort to debates or discussions, either on the floor or in committee, the view here expressed is in harmony with that entertained by members of the House Committee on Post-Offices and Post Roads at the last session of Congress, as indicated in the hearings which preceded the formulation of the appropriation bill for the present fiscal year.

"*Second.* An examination of numerous authorities on the subject confirms the opinion that no clause, phrase, or section of an appropriation act ought to be construed as permanent legislation unless such words are used

therein as make the purpose clear. Mr. Justice Story in *Minis* v. *United States* (15 Pet. 423, 445), states the rules as follows:

"'It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.'

"In the case of *United States* v. *Jarvis* (2 Ware's Reports), the court in construing a general regulation incorporated in an appropriation act says at page 278:

"'The act itself is one of those annual acts which spend their power in the course of the year, to which we are not accustomed to look for permanent regulations. If the legislature annex to such an act any special provision which has a proper application to the subject-matter of the act, and use no words indicating an intention to give it a more extensive operation, the just conclusion would seem to be that the special regulation was intended to be confined to the matters embraced by the act.'

"In Lewis's Sutherland on Statutory Construction (vol. 2, 2d ed., p. 663), many authorities are cited to sustain the general proposition that when the subject-matter of a statute is once clearly ascertained, all portions of it, even when couched in broader terms, will be restrained within the scope and purpose of the act itself, unless the legislative intent to give a broader effect is unmistakably revealed. As an instance of the application of this rule the author says:

"'Thus in the construction of a temporary appropriation act the presumption is that any special provisions of a general character therein contained are intended to be restricted in their operation to the subject-matter of the act, and not permanent regulations, unless the intention of making them so is clearly expressed.'"

In a later opinion, the Attorney-General considered

whether a provision repeated in a number of successive appropriation acts, but omitted from later ones, remained in force.

The following remarks (27 Opin. 294, 295) are directly applicable to the provisions here under consideration:

"This legislative history seems to show that the proviso under consideration was not viewed by Congress as establishing a permanent rule, but rather as being a special and temporary regulation concerning the particular bulletins for which at the very time of enacting the proviso appropriation was being made. Otherwise the repetition and reenactment of the proviso in each of seven successive years were strange and superfluous. Further, in consequence of the repeated previous treatment of the proviso by Congress as depending upon annual repetition and reenactment for its continued operation, the elimination of the proviso when the appropriation for Farmers' Bulletins was first made, in 1907, in the sundry civil appropriation act seems to show that it was then the intention of Congress to have the rule of the proviso no longer operative.

"While general and permanent enactments now not infrequently appear in appropriation acts, the presumption concerning a provision in such an act is rather against permanence. In the opinion of the Supreme Court in the case of *Minis* v. *United States* (15 Pet. 423), Mr. Justice Story said (p. 445):

"'It would be somewhat unusual to find engrafted upon an act making special and temporary appropriations, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. * * * * A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment.'

"Some suggestion of a permanent rule is found in the

declaration of the proviso that Farmers' Bulletins not seasonably called for by Members of Congress 'in each fiscal year' shall revert to the Secretary of Agriculture; but this verbal consideration hardly seems potent against the legislative history which has been detailed. The large feature of the matter is that Congress treated the rule as calling for annual reenactment if it were to be continued, and also seems to have sought its discontinuance by eliminating it from the sections making appropriations for Farmers' Bulletins in and after 1907."

In the enactments now under consideration for two fiscal years certain places were enumerated; for the two following fiscal years certain places were excepted; then Congress appropriated without either enumeration or exception. These authorities warrant the conclusion that its intention is to make the new appropriation as broad as the language imports and not to limit it by either the enumeration or the exceptions made in past years.

Analogy of Naval Statutes.

Any possible doubt of the intention of Congress is removed by a comparison of the statute of May 11, 1908, increasing the pay of the Army with the contemporaneous statute of May 13, 1908, increasing the pay of the Navy (35 Stat. L. 108–110, 127, 128).

The Navy act says (35 Stat. L. 128):

"All officers on sea duty and all officers on shore duty beyond the continental limits of the United States shall while so serving receive ten per centum additional of their salaries and increase as above provided, and such increase shall commence from the date of reporting for duty on board ship or the date of sailing from the United States for shore duty beyond the seas or to join a ship in foreign waters."

This provision, couched in language appropriate to the Navy, is precisely co-extensive with the provision for

increase to officers of the Army in the act of 1902 (*ante*, pp. 1, 2). All officers of the Navy have ever since its enactment received ten per cent increase for all service beyond the continental limits of the United States without exception (16 Comp. Dec. 19, 20).

In the recent case of *Plummer* v. *United States*, 224 U. S. 137, this court considered a ten per cent increase of another kind granted by this Navy pay statute of 1908, that is, for length of service. It was insisted on behalf of that officer that the statute on its face gave the right to have the longevity increase computed not only upon the grade pay, but also upon previous increases. This view was rejected by the court, in an opinion by the Chief Justice, mainly because the intention of Congress in the passage of the two acts of 1908 was to equalize the pay of the two services, and as the Army statute gave the increase only upon the grade pay, it was to be presumed that Congress did not desire a more liberal rule to be applied to the Navy. The language is (p. 144):

"In view of the purpose of Congress to equalize as far as possible the pay of Army and Navy officers, manifested by the adoption of the Navy Personnel Act of 1899 and in all subsequent legislation as to such pay," etc.

The same reason applies to the present case. Congress by the Navy pay act gives a ten per cent increase for all services rendered outside the continental limits of the United States without exception. The purpose of Congress to equalize the pay of Army and Navy officers can be carried out only by giving to the Army pay statute, a construction equally broad, especially when no exception to the generality of its terms is apparent on its face.

To put the matter in concrete form: Suppose an officer of the Navy of corresponding rank and length of service had been serving side by side with the claimant in this

case in Porto Rico. If that naval officer asked for a computation of his longevity pay by giving him increase upon increase, instead of simply upon the grade pay, he would be answered by this court that he was not entitled to it for the reason that Congress intended to equalize his compensation with that of the Army and Marine Corps, and that the literal terms of the navy act must be construed in the light of this general legislative purpose.

This case presents the converse of the question. This Marine officer is before this court asking for a ten per cent increase on account of his service in Porto Rico. Surely he may point with conclusive effect, in the light of the decision of this court in the *Plummer* case, to the fact that an officer of the Navy of equal rank and length of service with himself, when serving side by side with him in Porto Rico, would be drawing this ten per cent increase without question. Thus only would this officer and a naval officer of corresponding rank and length of service, serving together in Porto Rico, draw the same pay.

Conclusion.

To sum up our contentions:

1. The acts of 1906 and 1907 except officers serving in Porto Rico and Hawaii only from the benefit of the particular appropriations made by those acts, but do not even for those years deprive such officers of the benefit of the act of 1902, allowing increase of pay for all service beyond the States and contiguous Territories.

2. The act of 1908 provides: "That increase of pay for service beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be as now provided by law." This refers to the permanent act of 1902 and not to any temporary exceptions made for particular fiscal years.

3. The fact that Congress contemporaneously with the act of 1908 gave the increase without exception to all officers of the Navy serving beyond the continental limits of the United States is conclusive that it also intended to grant the increase to officers of the Army and Marine Corps serving in the same places.

The judgment of the court below includes the time spent in the voyage between New York and Porto Rico in both directions. In view of the provision of the act of 1902, record, top p. 4, "that the time of such service shall be counted from the date of departure from said States to the date of return thereto," no question will, we suppose, be raised as to the correctness of the inclusion of this time in the judgment, should the court hold it to have been correctly rendered on the main question.

The judgment of the Court of Claims should be affirmed.

GEORGE A. KING,
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Attorneys for Appellees.

APPENDIX.

From Decisions of Comptroller of the Treasury, Vol. X, pages 849-852.

Increase of Pay to Officers and Enlisted Men of the Marine Corps Serving Beyond the Limits of the United States.

The act of April 23, 1904, which provided for an increase in the pay of commissioned officers and enlisted men of the Army serving in the Philippine Islands, Guam, Alaska, China, and Panama, did not operate as a repeal of the provision in the act of June 30, 1902, for an increase in the pay of commissioned officers and enlisted men of the Army serving beyond the limits of the United States; and therefore commissioned officers and enlisted men of the Marine Corps serving beyond the limits of the United States are entitled, under the act of March 3, 1901, to the increased pay provided for by said act of June 30, 1902.

(Comptroller Tracewell to the Secretary of the Navy, June 22, 1904.)

By your reference of the 10th instant requesting a decision thereon, I have received a letter from Lieut. Col. George Richards, paymaster, Marine Corps, dated May 31, 1904, submitting the following question—

"whether the enactment of April 23, 1904 (33 Stat. 266), above cited, has operated to repeal the provisions of the act of June 30, 1902 (32 Stat. 512), as quoted, so far as officers and enlisted men of the Marine Corps payable by this office and serving at the stations named are concerned; and if so, from what date should this office discontinue the credit and payment to such officers and enlisted men whose pay you may determine to be affected by this recent legislation."

The laws relating to increased pay for foreign service are as follows:

The Army appropriation act of May 26, 1900 (31 Stat.

211), making appropriations for the support of the Army for the fiscal year 1901, provides:

"For additional twenty per centum increase on pay of enlisted men, $4,524,715: *Provided*, That hereafter, the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace."

The army appropriation act of March 2, 1901 (31 Stat. 903), making appropriations for the support of the Army for the fiscal year 1902, provides:

"For additional ten per centum increase on pay of officers serving at foreign stations, $500,000: *Provided*, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto: *Provided further*, That the officers and enlisted men who have served in China at any time since the 26th day of May, 1900, shall be allowed and paid for such service the same increase of pay proper as is herein provided for."

The navy appropriation act of March 3, 1901 (31 Stat. 1108), making appropriations for the support of the Navy for the fiscal year 1902, provides:

"*Provided*, That officers of the Navy and officers and enlisted men of the Marine Corps, who have been detailed or may hereafter be detailed for shore duty in Alaska, the Philippine Islands, Guam, or elsewhere beyond the continental limits of the United States, shall be considered as having been detailed for 'shore duty be-

yond seas,' and shall receive pay accordingly, with such additional pay as may be provided by law for service in island possessions of the United States."

The army appropriation act of June 30, 1902 (32 Stat. 512), making appropriation for the support of the Army for the fiscal year 1903, provides:

"For additional twenty per centum increase on pay of enlisted men, $1,771,480.34.

"For additional ten per centum increase on pay of commissioned officers serving at foreign stations, $451,456: *Provided*, That hereafter the pay proper of all commissioned officers and enlisted men serving beyond the limits of the States comprising the Union and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto."

The army appropriation act of April 23, 1904 (33 Stat. 266), making appropriation for the support of the Army for that fiscal year 1905, provides:

"For additional twenty per centum increase on pay of enlisted men serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $533,412.51.

"For additional ten per centum increase on pay of commissioned officers serving in the Philippine Islands, the Island of Guam, Alaska, China, and Panama, $167,426.30. * * * and all laws or parts of laws inconsistent with the provisions of this act are hereby repealed."

The act of March 2, 1901, *supra*, so far as it relates to foreign service generally, is in the same language as that found in the act of June 30, 1902, *supra*, except that the latter act adds the word 'commissioned' before the word 'officers.' These two acts contain specific grants for the

Army, and by the terms of section 1612 of the Revised Statutes, the same pay is allowed to officers and enlisted men of the Marine Corps as has been allowed the officers and enlisted men of the Army in the acts above quoted.

The provisions of the act of April 23, 1904, *supra*, contain no express repeal of the prior acts but there has been a failure to appropriate sufficient money to pay the increased pay for the fiscal year 1905, so far as the Army is concerned, beyond that found in the latter act.

Where a prior act contains an express grant in prospective, I do not think a mere failure to appropriate money sufficient to pay that authorized by the prior acts can be construed as a repeal of said prior acts.

The language found in the last clause of the army appropriation act of April 23, 1904, which states that "all laws or parts of laws inconsistent with the provisions of this act are hereby repealed," does not operate to repeal any one of the prior acts. I see nothing inconsistent in the latter-mentioned act with the provisions in the prior acts, and am therefore of opinion that the provisions of the prior acts are still in force, and if there has been appropriated for the officers and enlisted men of the Marine Corps money sufficient to pay them this increased pay, they may be paid the same, as heretofore.

In making appropriations for the Marine Corps they are made in general terms as for "pay and allowances prescribed by law, of officers on the active list, and pay of noncommissioned officers, musicians, and privates, as prescribed by law." These words have been considered as sufficient to authorize the use of the appropriations therein made to pay whatever sums have been granted by law, and I see no reason why the officers and enlisted men of the Marine Corps may not be paid the increased pay provided by the acts of June 30, 1902, and March 3, 1901, *supra*.